No. 18180

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORMULABS, INCORPORATED, a corporation, CLARENCE SCHREUR and GORDON S. LACY, individuals doing business as PACIFIC RESEARCH LABORATORY, a co-partnership,

Appellants,

vs.

HARTLEY PEN COMPANY, a corporation, doing business as THE HARTLEY CO., and E. I. du PONT de NEMOURS & COMPANY, a corporation,

Appellees.

INTERVENORS' BRIEF IN REPLY TO APPELLEE HARTLEY PEN CO.'S ANSWERING BRIEF

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PREFACE

This is Intervenors' reply to Hartley's answering brief of 76 pages.

Herein, as in prior briefs, the appellee Hartley Pen Company will be referred to as Hartley, and the appellee E. I. du Pont de Nemours & Company as du Pont.

The record designation is set forth on page 3 of Intervenors' opening brief.

SUMMARY OF ARGUMENT

I

HARTLEY IN ERROR CONTENDS THE DISTRICT COURT ORDER (App. pp. 122-124) DATED JULY 31, 1961, SIGNED SEPTEMBER 11, 1961, AND FILED SEPTEMBER 21, 1961, BARS INTERVENORS FROM FILING THEIR PRESENT COMPLAINT IN INTERVENTION (App. pp. 58-65) FILED AUGUST 9, 1961, AND ACTED UPON AND DISMISSED BY THE DISTRICT COURT ON JULY 30, 1962 (Tr. pp. 61-64), FROM WHICH DISMISSAL THIS APPEAL WAS TAKEN ON AUGUST 10, 1962 (Tr. pp. 78-80).

II

HARTLEY IN ERROR MAKES THE CONTENTION AT SCATTERED POINTS THROUGHOUT ITS BRIEF THAT ITS PROPERTY RIGHTS AND ITS CONSTITUTIONAL RIGHTS ARE BEING IGNORED.

III

HARTLEY CONTENDS:

> "IN HARTLEY'S OPPOSITION TO THE INTERVENORS' CONTENTIONS ON SAID APPEAL (16140) IT, AMONG OTHER THINGS, CONTENDED THAT THE CROSS-COMPLAINT WAS INSUFFICIENT AS A PLEADING AND DID NOT SATISFY FRCP 24(c). THIS COURT DID NOT RULE ON THIS."

IV

HARTLEY CONTENDS:

NOTWITHSTANDING THE EXPRESS PROVISIONS OF ITS LICENSE AGREEMENT PROHIBITING DISCLOSURE OF THE TRADE SECRET IT HAS THE RIGHT TO DISCLOSE AND THIS "WAS PATENTLY ANTICIPATED BY HARTLEY AND THE INTERVENORS".

V

HARTLEY CONTENDS:

"HARTLEY COULD HAVE LONG AGO DISCLOSED IN THE MAIN ACTION (PRIOR TO THIS COURT'S INJUNCTION AGAINST IT ON FEBRUARY 2, 1962) WITH NO OTHER CONSEQUENCE THAN FORMULABS' SUIT, IF ANY, TO CLAIM DAMAGES THEREFOR."

VI

HARTLEY CONTENDS:

THIS COURT AUTHORIZED INTERVENTION IN APPEAL 16140 " . . . BUT HOW OR BY WHAT PLEADING IT DID NOT DECIDE. THERE WAS NO PLEADING ISSUE BEFORE THIS COURT AND THIS COURT DID NOT DETERMINE ANY PLEADING ISSUE."

VII

HARTLEY CONTENDS:

"AS TO THE INTERVENORS' REPEATED CONTENTIONS THAT THEY WERE DENIED DUE PROCESS

BECAUSE THE COURT DISMISSED THEIR COMPLAINT IN INTERVENTION AND DENIED THE MOTION FOR PRELIMINARY INJUNCTION, HARTLEY SUBMITS THAT THEIR CONTENTIONS ARE PATENTLY WITHOUT ANY MERIT AT ALL."

VIII

HARTLEY CONTENDS:

"THE INTERVENORS STATE (14) 'THE OWNERSHIP RIGHTS OF INTERVENORS ARE UNCONTESTED.' "HARTLEY STATES THAT THIS IS NOT SO. HARTLEY HAS SERIOUSLY QUESTIONED THIS, . . . "

IX

HARTLEY CONTENDS:

"THE INTERVENORS CONFUSEDLY ARGUE (17-20) THAT NO DIVERSITY IS REQUIRED TO INTERVENE UNDER FRCP 24(a)(3) AND THAT THIS WAS ESTABLISHED BY THIS COURT IN 275 F. 2d 52. "HARTLEY ADMITS THAT NO DIVERSITY IS REQUIRED TO INTERVENE UNDER 24(a)(3) UNDER PROPER CIRCUMSTANCES AND UPON A PROPER RECORD."

X

HARTLEY CONTENDS:

RELATIVE TO INTERVENORS' STATEMENT ON PAGE 26 OF THEIR BRIEF THAT "NO OBJECTION WAS MADE BY ANY PARTY TO THAT FIRST APPEAL THAT THE COMPLAINT

IN INTERVENTION WAS IMPROPERLY DIRECTED AGAINST HARTLEY ALONE", THAT:

> "THIS IS A COMPLETELY INCORRECT STATEMENT OF THE RECORD. HARTLEY NOT ONLY OBJECTED BUT EMPHASIZED THE ABSURDITY OF THE CONTENTION THAT JUDGE HARRISON COULD ORDER DISCLOSURE (FORMULABS SO STATED) AND COULD THEN, AT FORMULABS' REQUEST, ORDER HARTLEY NOT TO OBEY HIS OWN ORDER TO DISCLOSE!"

XI

HARTLEY CONTENDS:

> "THE PLEADING IN THIS APPEAL, i.e., INTERVENTORS' 'COMPLAINT IN INTERVENTION', IS DIFFERENT FROM FORMULABS' CROSS-COMPLAINT IN 16140."

XII

HARTLEY'S ARGUMENT (HARTLEY BRIEF, pp. 71-75).

CONCLUSIONS

ARGUMENT

Hartley makes a few contentions justifying detailed discussion, and a large number of contentions justifying corrective comment.

The first Hartley contention viewed as needing detailed discussion is as follows:

I.

HARTLEY IN ERROR CONTENDS THE DISTRICT COURT ORDER (App. pp. 122-124) DATED JULY 31, 1961, SIGNED SEPTEMBER 11, 1961, AND FILED SEPTEMBER 21, 1961, BARS INTERVENORS FROM FILING THEIR PRESENT COMPLAINT IN INTERVENTION (App. pp. 58-65) FILED AUGUST 9, 1961, AND ACTED UPON AND DISMISSED BY THE DISTRICT COURT ON JULY 30, 1962 (Tr. pp. 61-64), FROM WHICH DISMISSAL THIS APPEAL WAS TAKEN ON AUGUST 10, 1962 (Tr. pp. 78-80).

This Hartley contention is found scattered through its brief at p. 11, p. 13 (2nd par.), p. 15 (2nd par.), p. 45 (5th par.), p. 49 (4th par.), p. 57 (2nd par.), p. 59 (last par.), p. 71 (6th par.) and p. 72 (4th par.).

Briefly, it is the Hartley contention that Intervenors were barred from filing their "Complaint in Intervention" (App. pp. 58-65), filed August 9, 1961, because it was not consistent with the District Court's Order filed September 21, 1961, signed September 11, 1961, backdated to July 31, 1961.

The Hartley contention is confused and without merit.

The relevant facts are set forth by Intervenors at App. p. 9,

par. 14 - p. 14, par. 30.

FIRST. The District Court's Order was modified, settled and signed September 11, 1961, and filed September 21, 1961. The present Complaint in Intervention was filed August 9, 1961, nearly six weeks earlier.

SECOND. The District Court Order dismissed, with right to amend, the first count of the earlier complaint of Formulabs (First Amended Pleading of Intervenor, App. pp. 102-113) which was substantially identical to the complaint before this Court in Appeal No. 16140, and dismissed without leave to amend two additional counts seeking declaratory relief; it granted permission to Schreur and Lacy to intervene joining Formulabs on the first count, but denied them the right to file their proposed "Intervenors' Cross-Complaint for Declaratory Judgment and for Injunction" (App. pp. 81-89), containing two counts substantially identical to the two counts of the Formulabs' complaint which were dismissed without leave to amend.

THIRD. The present Complaint in Intervention, basically similar to the first count of the Formulabs' complaint which Formulabs was given the right to amend, seeks the same relief as did the original proposed complaint before this Court in Appeal No. 16140 (present by virtue of the requirement of FRCP 24(c)), in which appeal this Court granted the right to intervene.

FOURTH. The present "Complaint in Intervention of Formulabs, Incorporated, Clarence Schreur and Gordon S. Lacy" was filed August 9, 1961, and was dismissed by the District Court

Order of July 31, 1962 (Tr. pp. 61-64) and supplemental orders which made that order final, as set forth in Intervenors' opening brief at page 4.

FIFTH. It is from that final order and judgment directed to the present complaint that this appeal is taken. If, in the view of the District Court, Intervenors were barred from filing the present complaint by virtue of an order the present complaint should have been dismissed upon that ground. It was not.

SIXTH. The reasons for the failure of the District Court to dismiss the present Complaint in Intervention as being barred by the Order of September 21, 1961 (not July 31, 1961) are clear. They are: (a) the present complaint was filed before the order was made, (b) the complaint was filed after the hearing on July 31, 1961 (App. pp. 159-169) at which the District Court, in addition to other things it said denying the right, gave oral permission to file that complaint and in the following words:

> "MR. SELLERS: If I may understand clearly, your Honor, your Honor's position is that I have no right to assert absolutely my ownership rights or my client's ownership rights against Hartley to prevent the disclosure by Hartley --
>
> "THE COURT: You assert every claim you can make in that first count, if you want to.
>
> "MR. SELLERS: I didn't finish, your Honor, I am sorry.
>
> "THE COURT: You can assert all the contracts

you want and all the rights you want."

(App. p. 165).

SEVENTH: To the extent the present complaint is, in the view of the District Court, improper, that was a grounds of dismissal of the present complaint. It is from the dismissal of the present complaint the present appeal is taken.

II

HARTLEY IN ERROR MAKES THE CONTENTION AT SCATTERED POINTS THROUGHOUT ITS BRIEF THAT ITS PROPERTY RIGHTS AND ITS CONSTITUTIONAL RIGHTS ARE BEING IGNORED

Hartley makes this contention at p. 25, par. 2; p. 27, 1st par.; p. 31, 1st par.; p. 32; p. 33; p. 34, third par.; p. 47, 3rd par.; p. 49, 2nd par.; p. 52, last par.; p. 66, 3rd par.; p. 69, 1st par.; and p. 73, 1st par.

Hartley is the appellee here. It has prevailed below. But Hartley is still complaining.

Hartley has made diametrically opposite representation as to its rights in and obligations relative to the trade secret to the extent that both Intervenors and du Pont are confused.

At each of the places in its answering brief identified above Hartley refers to the property rights it has in Intervenors' trade secret which, at an earlier, clearer day, it recognized as belonging to Intervenors.

Du Pont's understandable confusion resulting from the vacillating Hartley position is evident in its answering Brief when it says:

> "In the present case, by contrast, neither Hartley nor du Pont disputes Intervenors' claimed proprietary rights or asserts any paramount interest (or in the case of du Pont, any interest at all) in the secret ballpen in formulae."
>
> (du Pont Brief, p. 10)

This Court was clearly of the opinion that Hartley did not claim ownership when it said:

"The use of the secret formula by Hartley was under the terms of a written license agreement between Hartley and Formulabs.

- -

"In our view, Formulabs is so situated. Admittedly it is the owner of the secret formula and the secret testing procedures."

(Formulabs v. Hartley, 275 F. 2d 52, 124 USPQ 398)

Hartley formerly freely admitted it did not have ownership rights, or the right to disclose, and said to Judge Harrison:

"MR. FALCONE: If you make such an order, your Honor, as we told you in conference in chambers, we will accede to it, but we are going contrary to our contract with our licensor."

(Appeal 16140, Tr. p. 272)

Compare that statement with the statements now made by Hartley:

"Formulabs is not in the position of an owner opposing a stranger to its title or property. Hartley has rights and stands on parity, if not greater, rights with Formulabs."

(Hartley Brief, p. 26)

"The fact remains that Hartley has constantly

contended, and does, that it has co-extensive if not superior rights to the intervenors in the trade secrets."

(Hartley Brief, p. 47)

Hartley, having made an about turn, now contends it has property rights in Intervenors' secret; contends that despite the express wording of the contract denying Hartley the right to disclose (App. p. 64, par. 2) it has an implied right to disclose; contends again and again that its property rights are being ignored.

Hartley's argument is supported only by its own opinion inconsistent with its own earlier views. It cites no law to support its unusual contention of ownership rights. It appreciates, of course, that any contention of ownership rights contrary to Intervenors, however unrealistic, buttresses the District Court's refusal to take the case upon the grounds it will not decide contested rights between Intervenors and Hartley.

The simple facts are:

1. The continued existence of a binding contract between Intervenors and Hartley is admitted.
2. That contract clearly on its face binds Hartley not to disclose.
3. Hartley contends upon an unsupported legal theory that despite (2) it has the right to disclose.

No right of Hartley is being ignored. How could it be? The need to assert Hartley's rights in the property could arise only if Intervenors were first given the opportunity to assert

their rights. To date this opportunity has been denied them. The Hartley position is confused, unrealistic, contrary to logic and unsupported by a single citation in point.

III

HARTLEY CONTENDS:

"IN HARTLEY'S OPPOSITION TO THE INTERVENORS' CONTENTIONS ON SAID APPEAL (16140) IT, AMONG OTHER THINGS, CONTENDED THAT THE CROSS-COMPLAINT WAS INSUFFICIENT AS A PLEADING AND DID NOT SATISFY FRCP 24(c). THIS COURT DID NOT RULE ON THIS." (Parenthetical matter added.)
(Hartley Brief, p. 16)

Intervenors in their opening Brief, in combined titles 3 and 4 at pages 25, 26, state the "issue of the right of Formulabs to intervene with a proposed complaint seeking the exact relief sought by the complaint now dismissed by the District Court was decided in this Court" in Appeal No. 16140.

FRCP 24(c) provides:

"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought . . ."

The right to intervene was dependent upon the presence of a pleading asserting a good claim.

2 Barron & Holtzoff, Federal Practice and Procedure, §603, p. 233, n. 99;

4 Moore's Federal Practice, §24.14, p. 101, n. 1.

This Court was aware of the claim made by the proposed Complaint in Intervention in Appeal No. 16140 and said with respect thereto:

" . . . The cross complaint prayed that Hartley be enjoined from disclosing such trade secrets."

(275 F.2d 52, 54)

Hartley asserts (Hartley Brief, p. 16, p. 43, p. 55) that it contended in Appeal 16140, in its petition for rehearing, and in its petition for certiorari, that the complaint "was insufficient". It did.

Accordingly, the controlling facts are as follows:

1. The presence of a proposed pleading was a prerequisite for intervention under FRCP 24(c).
2. A proposed pleading seeking the same relief as the presently dismissed complaint was then before this Court.
3. This Court understood the relief sought.
4. Hartley contended the complaint "was insufficient".
5. This Court held the intervenor had the right to intervene.

Hartley now seeks to have this Court rule in effect that when it held in Appeal 16140 that the intervenor could intervene this Court really meant:

1. That intervention of some kind was proper but not intervention seeking the relief sought by the only pleading before the Court;

2. That the intervenor, contrary to the decision, did not really have the right to intervene seeking the relief the Court knew it was seeking and which relief it discussed in its decision;

3. That despite the fact Hartley contended before this Court the Intervenor's pleading "was insufficient" this Court did not consider that question when it held intervention was proper, it being remembered that a proposed pleading is essential under 24(c);

4. That although the compulsory complaint in intervention in Appeal 16140 sought an injunction against Hartley to this Court's knowledge, and as referred to in its opinion, the relief sought was outside the jurisdiction of the District Court, and this Court did not intend to hold or to imply that intervenor had the right to file that complaint.

Hartley's contentions are interesting. They are unsound. If they are to control when would there be an end to litigation?

IV

HARTLEY CONTENDS:

NOTWITHSTANDING THE EXPRESS PROVISIONS OF ITS LICENSE AGREEMENT PROHIBITING DISCLOSURE OF THE TRADE SECRET IT HAS THE RIGHT TO DISCLOSE AND THIS "WAS PATENTLY ANTICIPATED BY HARTLEY AND THE INTERVENORS". (Hartley Reply Brief, p. 24).

The right of the owner of a trade secret to enforce the maintenance of secrecy upon those to whom it has been disclosed in secret or under contract is set forth in Intervenors' Brief in No. 17741 at pages 6-8.

Hartley frequently reasserts in its brief that it has the right to disclose notwithstanding the express denial of that right in the license agreement (App. pp. 63-65).

There is one fatal weakness in the Hartley position. Contracts are binding. Hartley finds no law to support its position, nor can Intervenors.

It is denied that it was "patently anticipated", or otherwise, that Hartley should have the right to disclose. Any exceptions to the prohibition of the written agreement should be expressed with the same preciseness as the prohibition itself, and should have the same clarity and weight.

The Hartley position is untenable.

V

HARTLEY CONTENDS:

"HARTLEY COULD HAVE LONG AGO DISCLOSED IN THE MAIN ACTION (PRIOR TO THIS COURT'S INJUNCTION AGAINST IT ON FEBRUARY 2, 1962) WITH NO OTHER CONSEQUENCE THAN FORMULABS' SUIT, IF ANY, TO CLAIM DAMAGES THEREFOR." (Hartley Brief, p. 33).

The facts:

Intervention was brought to prevent the disclosure of the trade secret under the order of the District Court.

Prior to the first appeal, 16140, Mr. Falcone, counsel for Hartley, stated to Mr. Sellers, counsel for Formulabs, that Hartley would never disclose the secret to du Pont until after it had exhausted its legal remedy in the highest court. That statement and assurance was accepted by Intervenors' counsel on behalf of Intervenors and is still relied upon. Hartley cannot disclose without Mr. Falcone's breaking his word and as to that Intervenors and their counsel are not concerned. We may question Mr. Falcone's position. We may contend his reasoning is undisciplined and confused. We do not question his integrity.

Had the facts not been as here recited, Intervenors would not have been content to have the District Court pigeonhole their motion for a preliminary injunction from August 9, 1961, to July 31, 1962. Mr. Falcone knows this and has not forgotten his promise. The statement made in the heading of this section, therefore, is misleading.

VI

HARTLEY CONTENDS:

THIS COURT AUTHORIZED INTERVENTION IN APPEAL 16140 " . . . BUT HOW OR BY WHAT PLEADING IT DID NOT DECIDE. THERE WAS NO PLEADING ISSUE BEFORE THIS COURT AND THIS COURT DID NOT DETERMINE ANY PLEADING ISSUE. " (Hartley Brief, p. 37).

Here we have confusion.

In its answering brief at page 16, as discussed above under Title III, Hartley alleged that it contended before this Court in Appeal 16140 that "the cross-complaint was insufficient". Now on page 37, as quoted above, it states the issue was not raised.

In considering this question the Court should have in mind the following:

1. FRCP 24(c) requires that an intervenor with his motion to intervene file a proposed complaint.

2. The law, as cited by Hartley in its Petition for Rehearing in Appeal No. 16140, and as referred to at greater length hereinafter under Title IX (p. 23 of this Brief), is that:

"The claimant for intervention must state a good claim on which relief can be granted. "

3. This Court was advised by du Pont in its Brief in Appeal 16140 at page 10:

"It is clear that Formulabs' sole objective in seeking to intervene was to obtain an injunction

restraining Hartley from disclosing certain trade secrets.

"If Formulabs' sole objective in seeking to intervene was to obtain something to which it was not lawfully entitled, then the order denying intervention was proper."

4. This Court was advised by Hartley in its Brief in Appeal 16140 at page 20:

". . . That Formulabs 'herein seeks to have plaintiff enjoined from the disclosure' of its trade secrets (78); Formulabs prayed 'for judgment and an injunction enjoining plaintiff herein from disclosing to defendant . . . '." (Emphasis was present.)

5. And at page 32:

". . . Formulabs sought to intervene not against the Court's order of disclosure, nor against defendant who requested the disclosure, but strangely against plaintiff by asking the same Court to enjoin plaintiff from obeying the Court's order to disclose." (Emphasis was present.)

"There is no such authority and such procedure is devoid of any logical or legal support."

And at page 58:

"Plaintiff points out that Formulabs' motion and proposed cross-complaint were predicated on the controversy which it sought to create between itself and plaintiff and did not attack the order or defendant for seeking it." (Emphasis was present.)

And the Hartley Brief in 16140 at page 65:

> "The motion (to intervene) must set forth the grounds for intervention and shall be accompanied by a pleading setting forth the claim or defense for which the intervention is sought. Rule 24(c)."

And at page 67:

> "As noted . . . Formulabs sought to <u>enjoin plaintiff</u> from disclosure, praying judgment <u>against plaintiff</u>." (Emphasis was present.)

If this Court had one fact forcefully and repeatedly called to its attention in 16140 it was the thrust of the proposed complaint in intervention.

How could it have held intervention was proper without accepting the proposed complaint?

VII

HARTLEY CONTENDS:

"AS TO THE INTERVENORS' REPEATED CONTENTIONS THAT THEY WERE DENIED DUE PROCESS BECAUSE THE COURT DISMISSED THEIR COMPLAINT IN INTERVENTION AND DENIED THE MOTION FOR PRELIMINARY INJUNCTION, HARTLEY SUBMITS THAT THEIR CONTENTIONS ARE PATENTLY WITHOUT ANY MERIT AT ALL."
(Hartley Brief, p. 42)

Intervenors' position in this connection is set forth in their Brief, Title 2, pages 21-24, entitled "The District Court Erred in Holding, in Violation of Intervenors' Property Rights and Their Right to Due Process under the Constitution, that Intervenors' Sole Right in Protecting Their Property is to Join Hartley in a 'Me Too' Position Opposing Du Pont's Effort to Show 'Good Cause' Justifying Discovery."

It is the denial by the District Court of Intervenors' right to assert their property rights, while concurrently asserting jurisdiction over that property and disposing of it, that violates Intervenors' property rights and their right to due process, both under the Constitution. Intervenors have been denied their day in court to assert their property rights. Dismissing their complaint and refusing to hear their claim for lack of jurisdiction, coupled with the taking of their property, is not due process.

Hartley earlier in its Brief in Appeal 16140, at page 51, asserted the correct law and as follows:

"'Whatever else may be uncertain about the

definition of "due process", all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.' O'Choa v. Hernandez, 230 U. S. 139, 161." (underlining added).

(Hartley Brief, Appeal 16140, p. 51)

VIII

HARTLEY CONTENDS:

"THE INTERVENORS STATE (14) 'THE OWNERSHIP RIGHTS OF INTERVENORS ARE UNCONTESTED.'

"HARTLEY STATES THAT THIS IS NOT SO. HARTLEY HAS SERIOUSLY QUESTIONED THIS . . ."
(Hartley Brief, p. 45)

The confusion Hartley has produced in this contention is set forth above under Title II.

IX

HARTLEY CONTENDS:

"THE INTERVENORS CONFUSEDLY ARGUE (17-20) THAT NO DIVERSITY IS REQUIRED TO INTERVENE UNDER FRCP 24(a)(3) AND THAT THIS WAS ESTABLISHED BY THIS COURT IN 275 F. 2d 52.

"HARTLEY ADMITS THAT NO DIVERSITY IS REQUIRED TO INTERVENE UNDER 24(a)(3) UNDER PROPER CIRCUMSTANCES AND UPON A PROPER RECORD."
(Emphasis added)
(Hartley Brief, p. 48)

Confused? Proper circumstances? Proper record?

Intervenors' argument referred to is found under the title "The District Court Erred in Holding It Had No Jurisdiction of Intervenors' Complaint in Intervention", pp. 13-20.

The complaint filed in the District Court with the motion to intervene, the complaint before this Court in Appeal 16140 in which this Court held the right to intervene was present, and the present Complaint in Intervention, all make the same claim and seek the same relief.

What circumstance could be more "proper" than to file a complaint in intervention after the right to intervene had been sustained by the Court of Appeals?

What record could be more "proper" than a complaint in intervention filed under the compulsory requirement of FRCP 24(c), presented to this Court as a part of the record on appeal in Appeal 16140 to determine the right to intervene, and filed in the District Court after that right was sustained. The present

complaint is an amendment to that original complaint, makes the same claim against the plaintiff Hartley only, as did the original complaint, and seeks injunctive relief against Hartley only as did the original claim.

A more "proper record" under more "proper circumstances" would be hard to imagine.

X

HARTLEY CONTENDS:

RELATIVE TO INTERVENORS' STATEMENT ON PAGE 26 OF THEIR BRIEF THAT "NO OBJECTION WAS MADE BY ANY PARTY TO THAT FIRST APPEAL THAT THE COMPLAINT IN INTERVENTION WAS IMPROPERLY DIRECTED AGAINST HARTLEY ALONE", THAT:

> "THIS IS A COMPLETELY INCORRECT STATEMENT OF THE RECORD. HARTLEY NOT ONLY OBJECTED BUT EMPHASIZED THE ABSURDITY OF THE CONTENTION THAT JUDGE HARRISON COULD ORDER DISCLOSURE (FORMULABS SO STATED) AND COULD THEN, AT FORMULABS' REQUEST, ORDER HARTLEY NOT TO OBEY HIS OWN ORDER TO DISCLOSE!"
>
> (Hartley Brief, p. 55)

Hartley is correct.

In preparing the Opening Brief, Intervenors' counsel recalled that Hartley contended the District Court would not grant the relief sought and that the complaint should be directed against du Pont, but that is not the same as saying the Intervenor could not direct the complaint against Hartley alone if it so elected.

Since receiving Hartley's Brief, Intervenors' counsel has

reviewed the record and wishes to acknowledge error and to apologize for the statement which is inaccurate. Hartley did object to the proposed claim in intervention.

Intervenor made its incorrect statement here in connection with its contention of res judicata and cited the Partmar Corp. v. Paramount Pictures Theatres Corp. et al. (S. Ct. 1953), 347 U. S. 89, 74 S. Ct. 414, in support of the contention that even though the issue was not raised the doctrine of res judicata applied for it might have been raised.

The fact that the issue was actually raised, as pointed out by Hartley, strengthens Intervenors' position for if the issue was raised it must have been decided in Intervenors' favor for this Court held the right to intervene was present.

In its "Petition of Appellee Hartley Pen Company for Rehearing" in 16140 Hartley said:

> "The only basis this Court has to decide Formulabs' right is to consider (as it did) its motion and cross-complaint."
>
> (Hartley Pet. for Rehearing in Appeal 16140, p. 7)
>
> "Rule 24(c) requires the claimant for intervention to state the grounds of his motion and to accompany it with a pleading setting forth the claim or defense for which the intervention is sought.
>
> "This clearly requires the statement of a good claim.
>
> "2 Barron & Holtzoff, Federal Practice and Procedure, §603, p. 233, no. 99;

4 Moore's Federal Practice, §24.14, p. 101, n. 1 "The claimant for intervention must state a good claim on which relief can be granted. Shurtz v. Foster & Kleiser (D.C. Cal. 1939), 29 F.S. 162; 2 Barron & Holtzoff, p. 233, n. 99."

(Hartley Pet. for Rehearing in Appeal 16140, p. 7) "Such a cross-complaint does not state the required claim or defense against either party."

(Hartley Pet. for Rehearing in Appeal 16140, p. 8) ". . . it [the District Court] might construe to be the direct or inferred mandate of this Court's decision that it should do so [order Hartley not to disclose] since it may be contended that this Court held that Formulabs is entitled to intervene upon its present cross-complaint." (Parenthetical matter added).

(Hartley Pet. for Rehearing in Appeal 16140, p. 9) "This blanket qualification of Formulabs as a claimant for intervention as a matter of right, may lead to the contention that since its right to intervene was (and could only be) based upon its documents and procedure therefor, including the cross-complaint, this Court has held that the cross-complaint states a 'claim' or cause of action."

(Hartley Pet. for Rehearing in Appeal 16140, p. 12) "If its decision continues unqualified, it may be contended that it held ... that Formulabs' cross-

complaint states a cause of action or claim for the relief it requests, i.e., that it is proper, . . ."

(Hartley Pet. for Rehearing in Appeal No. 16140, p. 14)

"If its decision remains unqualified, it will permit Formulabs to litigate in the main action an entirely separate cause of action, if any, i.e., a cause of action against petitioner predicated upon its contract with petitioner, which is completely foreign to the issues tendered in the main action."

(Hartley Pet. for Rehearing in Appeal No. 16140, p. 15)

Intervenors' position has been strengthened.

XI

HARTLEY CONTENDS:

"THE PLEADING IN THIS APPEAL, I.E., INTERVENORS' 'COMPLAINT IN INTERVENTION', IS DIFFERENT FROM FORMULABS' CROSS-COMPLAINT IN 16140."

(Hartley Brief, pp. 57, 58)

Hartley makes this statement in arguing that Intervenors are not entitled to file their present complaint under the law of the case.

The original complaint present in Appeal 16140 is found at pp. 75-81 of the Transcript of Record in that appeal.

The present complaint in this Appeal 18180 is found at

App. pp. 58-65.

In each complaint it is alleged the ink formula is the subject matter, disclosure to Hartley in confidence and under the contract is recited, a copy of the agreement is attached, and an injunction is sought. Intervenors Schreur and Lacy here join the original intervenor in Appeal 16140.

By early Appeal 16140 the right was gained by the intervenor Formulabs to intervene with respect to the same cause of action seeking the same relief as the present complaint.

XII

HARTLEY'S ARGUMENT (HARTLEY BRIEF, pp. 71-75).

The Hartley Argument presents nothing not previously covered.

The matter of the District Court order filed September 21, 1961, signed September 11, 1961, and backdated to July 31, 1961, (Hartley Brief, pp. 71, 72) is discussed above under Title I at page 6.

The matter of the alleged overlooking of Hartley's rights, again referred to at page 73, is covered under Title II of this Brief at page 10.

The reference to the right of Intervenors on page 73 to prevent the unpermitted disclosure of their secret and the potential injury to Intervenors present nothing new.

The repeated allegation that the parties to the license

agreement contemplated disclosure contrary to its express provisions is repeated on page 73, was earlier alleged, and is disposed of at Title II, page 10, of this Brief.

Hartley's Argument at page 74 refers to "the absurd statements of the intervenors" and alleges "the intervenors ignore every basic concept of intervention." Hartley's entire Argument cites one case, Hurn v. Ousler, 289 U.S. 238, 77 L. Ed. 1148, 53 S. Ct. 586, having nothing to do with intervention under FRCP 24(a)(3) to protect property in the custody of and under the control of the Court.

The Hartley Argument adds nothing constructive to the Hartley position.

CONCLUSION

The Hartley answering Brief is of little aid to its position being directed largely to repetitious argument based upon Hartley's unsupported opinions.

Dated: January 22, 1963.

Respectfully submitted,

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